

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DOUGLAS FANSLER and CHARLENE
FANSLER, husband and wife,

Plaintiff,

v.

LAFARGE NORTH AMERICA, INC., a
foreign corporation,

Defendant.

No. CV-04-5067-FVS

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT

THIS MATTER came before the Court pursuant to Plaintiffs' motion for partial summary judgment, Ct. Rec. 23. Plaintiffs Douglas and Charlene Fansler are represented by Bruce Spanner. Defendant LaFarge North America, Inc. ("LaFarge") is represented by Christopher Tompkins. This motion was noted for hearing without oral argument.

JURISDICTION

Plaintiffs filed an action for damages in Benton County Superior Court on May 6, 2004. Defendant timely removed the action to this Court on June 4, 2004. 28 U.S.C. § 1441. The Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332 because Plaintiffs are Washington citizens and Defendant is a foreign corporation. Since federal jurisdiction in this case is based on diversity of citizenship, the Court must apply the

1 substantive law of the State of Washington. *Erickson v. Desert*
2 *Palace, Inc.*, 942 F.2d 694, 695 (9th Cir 1991) (citing *Erie R.R. v.*
3 *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)).

4 BACKGROUND

5 Plaintiff Douglas Fansler is an employee of Central Pre-Mix,
6 working as a bulk tanker truck driver. On August 15, 2001, Mr.
7 Fansler went to LaFarge's facility in Pasco, Washington, to load
8 his truck with fly ash. Prior to August 15, 2001, Mr. Fansler had
9 loaded his truck at LaFarge's Pasco facility on numerous occasions
10 without incident. Generally, Mr. Fansler's truck was loaded by the
11 manager of the facility, Eric Lundin. However, on August 15, 2001,
12 the facility was operated LaFarge employee Damon Matthews.¹

13 On that date, Mr. Fansler parked his truck under the chute
14 inside the facility to be loaded. The chute is connected to a silo
15 containing fly ash and cement. The plant operator, in this case
16 Mr. Matthews, lowers the chute into the top of the truck and turns
17 on the auger which transfers the fly ash from the silo to the
18 truck. When the truck is being loaded, the loading system forms a
19 seal with the opening in the truck ensuring that the fly ash is
20 completely sealed as it is being transported from inside the silo
21 to the truck.

22
23 ¹ Mr. Matthews worked for LaFarge from March 2001 through
24 October 2003. Although Mr. Matthews was hired and paid by a
25 temporary employment agency called Manpower, he was supervised
26 directly by Eric Lundin, the manager of LaFarge's Pasco facility.
LaFarge does not dispute that Mr. Matthews was its employee and
that it is liable for Mr. Matthews' involvement in the incident
on August 15, 2001.

1 Once the truck is positioned properly under the chute, the
2 loading process is controlled by the plant operator from inside the
3 control room. Before loading a truck, the truck is weighed and the
4 desired amount of fly ash is loaded into the truck based on weight.
5 There is no alarm that sounds when the desired weight is reached.
6 Rather, it is the plant operator's job to watch the scale as the
7 truck is being loaded and shut off the chute delivering the fly ash
8 approximately 5,000 pounds shy of the desired amount.

9 On this particular occasion, after Mr. Fansler parked his
10 truck under the chute to be loaded, he got out and used an air hose
11 to clean off debris from his truck. Mr. Fansler had gotten out of
12 his truck during the loading process on previous occasions without
13 incident. Mr. Fansler had never been told to remain in his truck
14 during loading and he was not aware of any requirement that drivers
15 remain in their truck while the truck is being loaded. There are
16 no rules or posted signs at LaFarge's plant regarding where drivers
17 are supposed to remain during loading. Although Mr. Matthews
18 observed Mr. Fansler get out of his truck and use the air hose to
19 clean the truck, Mr. Matthews did not instruct Mr. Fansler to
20 remain in his truck.

21 While Mr. Matthews was loading Mr. Fansler's truck, Mr.
22 Matthews was "multitasking". Although he was checking the scale
23 periodically, Mr. Matthews was also typing up his bills of lading
24 at the same time. At some point during the loading process, Mr.
25 Matthews looked back to the scale and realized that he should have
26 already turned off the chute. At the same time he realized this,

1 he looked up and saw that fly ash was flowing out of the top of the
2 truck hitting the ground and creating lots of dust. The fly ash
3 covered Mr. Fansler, who was standing next to his truck.

4 Plaintiffs' Complaint alleges that Mr. Fansler suffered
5 personal injuries as a result of inhaling fly ash on August 15,
6 2001. Plaintiffs contend Mr. Matthews, LaFarge's employee, was
7 negligent in loading Mr. Fansler's truck and that this negligence
8 was the proximate cause of Mr. Fansler's injuries allegedly caused
9 by inhaling fly ash. Plaintiffs also contend Mr. Fansler was not
10 negligent. Plaintiffs now move for summary judgment on LaFarge's
11 negligence and Mr. Fansler's contributory negligence.

12 **DISCUSSION**

13 *A. Summary Judgment Standard*

14 A moving party is entitled to summary judgment when there are
15 no genuine issues of material fact in dispute and the moving party
16 is entitled to judgment as a matter of law. Fed. R. Civ. P. 56;
17 *Celotex Corp. v. Catrett*, 477 U.S. 316, 323, 106 S.Ct. 2548, 2552
18 (1986). Inferences drawn from facts are to be viewed in the light
19 most favorable to the non-moving party, but the non-moving party
20 must do more than show that there is some "metaphysical doubt" as
21 to the material facts. *Matsushita Elec. Indus. Co. v. Zenith*
22 *Radio*, 475 U.S. 572, 586-87, 106 S.Ct. 1348, 1356 (1986). The non-
23 moving party cannot rely on conclusory allegations alone to create
24 an issue of material fact. *Hansen v. United States*, 7 F.3d 137,
25 138 (9th Cir. 1993). There is no issue for trial "unless there is
26 sufficient evidence favoring the non-moving party for a jury to

1 return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*,
2 477 U.S. 242, 249, 106 S.Ct. 2505, 2511 (1986). A mere "scintilla
3 of evidence" in support of the non-moving party's position is
4 insufficient to defeat a motion for summary judgment; "there must
5 be sufficient evidence upon which a jury could reasonably find for
6 the non-movant." *Id.* at 252, 106 S.Ct. at 2512.

7 *B. Negligence*

8 The elements of a negligence cause of action are the existence
9 of a duty to the plaintiff, breach of that duty, and injury to the
10 plaintiff proximately caused by the breach. *Hertog, ex rel. S.A.H.*
11 *v. City of Seattle*, 138 Wash.2d 265, 275, 979 P.2d 400 (1999).
12 Existence of a duty is a question of law. *Id.* Breach and
13 proximate cause are generally fact questions for the trier of fact.
14 *Id.* However, these questions may be determined as a matter of law
15 if reasonable minds could not differ. *Id.*

16 *1. Duty*

17 "A business invitee is defined as "a person who is invited to
18 enter or remain on land for a purpose directly or indirectly
19 connected with business dealings with the possessor of the land."
20 *Beebe v. Moses*, 113 Wash. App. 464, 467, 54 P.3d 188 (2002). It is
21 undisputed that Mr. Fansler was LaFarge's business invitee because
22 Mr. Fansler went to LaFarge's Pasco facility to have his truck
23 loaded with fly ash. Therefore, LaFarge had a duty to use
24 reasonable care to protect Mr. Fansler from dangerous conditions on
25 the premises of LaFarge's Pasco facility. *Nivens v. 7-11 Hoagy's*
26 *Corner*, 133 Wash.2d 192, 198, 943 P.2d 286 (1997) (citations

1 omitted). This includes a duty to ascertain and warn of dangerous
2 conditions. *Id.*

3 2. Breach

4 LaFarge does not dispute that it breached its duty to use
5 reasonable care to protect Mr. Fansler from dangerous conditions
6 when Mr. Matthews failed to stop the loading process when necessary
7 and overflowed Mr. Fansler's truck with fly ash. Defendant
8 acknowledges that overflowing Mr. Fansler's truck was the result of
9 Mr. Matthews' negligence as the plant operator and Mr. Fansler did
10 nothing to contribute to the fly ash overflowing from the truck.
11 However, LaFarge does dispute that overflowing Mr. Fansler's truck
12 was the proximate cause of Mr. Fansler being covered in fly ash.

13 3. Proximate Cause

14 There are two elements of proximate cause: legal causation and
15 cause in fact. *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wash.2d
16 468, 478, 951 P.2d 749 (1998). There is cause-in-fact if the
17 plaintiff's injury would not have occurred "but for" the
18 defendant's negligence. *Hertog*, 138 Wash.2d at 282-83, 979 P.2d
19 400. "Legal causation rests on considerations of policy and common
20 sense as to how far the defendant's responsibility for the
21 consequences of its actions should extend." *Id.* at 283, 979 P.2d
22 400 (internal quotations and citations omitted). Proximate cause
23 may be a question of law for the Court if the facts are undisputed,
24 the inferences are plain and unescapable, and reasonable minds
25 could not differ. *Peterson v. State*, 100 Wash.2d 421, 436, 671
26 P.2d 230 (1983).

1 LaFarge argues that a "jury could reasonably find that
2 plaintiff failed to exercise due care under the circumstances and
3 that his choice to remain in a position where he was exposed to an
4 overflow of fly ash was the sole proximate cause of his alleged
5 injuries." Defendant's Opposition to Plaintiffs' Motion for
6 Partial Summary Judgment, 8 (emphasis in original). Essentially,
7 LaFarge is arguing that Mr. Fansler was also negligent and that his
8 contributory negligence, not LaFarge's negligence, was the
9 proximate cause of Mr. Fansler being covered in fly ash.

10 Even if the Court determines there is evidence creating an
11 issue of fact as to whether Mr. Fansler was negligent, summary
12 judgment is still proper here on the issue of LaFarge's negligence.
13 LaFarge appears to argue that Mr. Fansler's contributory negligence
14 acts as a intervening cause, barring the Court from entering
15 summary judgment on the issue of LaFarge's negligence. However,
16 contributory negligence does not bar recovery, it only diminishes
17 proportionally, the amount of damages awarded. RCW 4.22.005.
18 Therefore, while Mr. Fansler's damages may be reduced if he was
19 negligent, this does not preclude the Court from finding LaFarge
20 negligent as a matter of law. *See Clements v. Blue Cross of*
21 *Washington and Alaska, Inc.*, 37 Wash.App. 544, 682 P.2d 942
22 (1984)(affirming grant of summary judgment on defendant's
23 negligence and remanding for trial on issue of plaintiff's
24 contributory negligence).

25 The facts are undisputed. No issue of fact remains with
26 respect to LaFarge's negligence. LaFarge breached its duty to use

1 reasonable care to protect Mr. Fansler from dangerous conditions.
2 "But for" Mr. Matthews' failure to properly stop the loading
3 process when necessary, the fly ash would not have spilled over the
4 truck covering Mr. Fansler. Reasonable minds could not differ on
5 the conclusion that LaFarge's breach of its duty was a proximate
6 and legal cause of the spilling of fly ash on Mr. Fansler.
7 Accordingly, the Court grants Plaintiffs' motion for partial
8 summary judgment on the issue of LaFarge's negligence.

9 *C. Contributory Negligence*

10 "Contributory negligence is conduct on the part of the
11 plaintiff, contributing as a legal cause to the harm he has
12 suffered, which falls below the standard to which he is required to
13 conform for his own protection." *Geschwind v. Flanagan*, 121
14 Wash.2d 833, 838, 854 P.2d 1061 (1993)(citing W. Page Keeton et
15 al., *Prosser and Keeton on Torts*, § 65, at 451 (5th ed. 1984). In
16 determining whether a person was contributorily negligent, "the
17 inquiry is whether or not he exercised that reasonable care for his
18 own safety which a reasonable man would have used under the
19 existing facts and circumstances and, if not, was his conduct a
20 legally contributing cause of his injury." *Rosendahl v. Lesourd*
21 *Methodist Church*, 68 Wash.2d 180, 182, 412 P.2d 109 (1966). "A
22 plaintiff's negligence relates to a failure to use due care *for his*
23 *own protection* whereas a defendant's negligence relates to a
24 failure to use due care *for the safety of others*." *Geschwind*, 121
25 Wash.2d at 833, 854 P.2d 1061 (emphasis in original). The general
26 rule is that the question of contributory negligence is one for the

1 jury to determine. *Baxter v. Greyhound Corp.*, 65 Wash.2d 421, 397
2 P.2d 857 (1964); *Hough v. Ballard*, 31 P.3d 6, 10, 108 Wash. App.
3 272 (Div. 2, 2001) (holding that the issue of contributory
4 negligence is a jury question unless "all reasonable minds would
5 agree that the plaintiff exercised the care a prudent person would
6 have exercised under the circumstances."). A finding of
7 contributory negligence as a matter of law should be made only in
8 the clearest of cases and when reasonable minds could not have
9 differed in their interpretation of a factual pattern. *Browning v.*
10 *Ward*, 70 Wash.2d 45, 48-49, 422 P.2d 12 (1966); *Bordynoski v.*
11 *Bergner*, 97 Wash.2d 335, 340, 644 P.2d 1173 (1982).

12 Here, although LaFarge does not dispute any of the material
13 facts surrounding the incident in question, it argues that the
14 issue of Mr. Fansler's contributory negligence should be submitted
15 to a jury because reasonable men could reach different conclusions
16 as to whether a reasonable prudent person would have acted as Mr.
17 Fansler did under the circumstances. To support its argument that
18 Mr. Fansler was contributory negligent, LaFarge relies on the
19 depositions of Mr. Fansler and Mr. Matthews. LaFarge cites
20 portions of Mr. Fansler's deposition showing that Mr. Fansler was
21 aware of the loading procedures. LaFarge argues that because of
22 this knowledge, Mr. Fansler should have recognized the inherent
23 risks associated with standing outside his truck while it was being
24 loaded. LaFarge also cites the following statement from Mr.
25 Matthews' deposition: "It is common knowledge that all the drivers
26 stay in their trucks because you never know when an accident will

1 happen."

2 On the present record, the Court cannot conclude as a matter
3 of law that all reasonable minds would agree that Mr. Fansler
4 exercised the ordinary care or such care as a reasonable person
5 would have exercised under the same or similar circumstances.
6 Looking at the facts in the light most favorable to LaFarge, there
7 is evidence sufficient to raise questions of material fact as to
8 whether Mr. Fansler failed to exercise due care for his own safety
9 when he stepped out of his truck while it was being loaded.
10 Therefore, the issue of Mr. Fansler's contributory negligence is a
11 jury question. Accordingly, the Court denies Plaintiffs' motion
12 for partial summary judgment on the issue of contributory
13 negligence.

14 **IT IS HEREBY ORDERED** that Plaintiffs' Motion for Partial
15 Summary Judgment, Ct. Rec. 23, is **GRANTED IN PART AND DENIED IN**
16 **PART**, as indicated in the Court's Order set forth above.

17 **IT IS SO ORDERED.** The District Court Executive is hereby
18 directed to enter this Order and furnish copies to counsel.

19 **DATED** this 21st day of June, 2005.

20
21 s/ Fred Van Sickle
Fred Van Sickle
22 Chief United States District Judge
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